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# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. 898

JOHN ALAN APPLEMAN and JEAN G. APPLEMAN,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. App. i-vi)[1] is reported at 338 F. 2d 729.

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[1] "Pet. App." references are to the opinion of the Court of Appeals set forth in the appendix to the petition; "R." references are to the separately bound Appendix to the brief of the Government filed in the court below.

## JURISDICTION

The judgment of the court of appeals was entered on November 19, 1964 (Pet. App. i). The petition for a writ of certiorari was filed on February 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTION PRESENTED

Whether the losses sustained by the petitioners by reason of the death of their elm trees from the disease phloem necrosis were deductible casualty losses within the meaning of Section 165(c) of the Internal Revenue Code of 1954.

## STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 165. LOSSES.
>
> (a) *General Rule.*—There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.
>
> * * * *
>
> (c) *Limitation on Losses of Individuals.*—In the case of an individual, the deduction under subsection (a) shall be limited to—
>
> (1) losses incurred in a trade or business;
>
> (2) losses incurred in any transaction entered into for profit, though not connected with a trade or business; and
>
> (3) losses of property not connected with a trade or business, if such losses arise from

> fire, storm, shipwreck, or other casualty, or from theft. No loss described in this paragraph shall be allowed if, at the time of the filing of the return, such loss has been claimed for estate tax purposes in the estate tax return.
>
> * * * *

(26 U.S.C. 1958 ed., Sec. 165.)

## STATEMENT

On their income tax returns for the years 1956, 1957, and 1958, the petitioners, husband and wife, deducted amounts reflecting the depreciation in value of their property by reason of the death in each of those years of a number of elm trees from the disease phloem necrosis (Pet. App. i, iv). On this property, a 25-acre tract located about four miles from Urbana, Champaign County, Illinois, the petitioners had their home and his office (Pet. App. iv; R. 38, 39-40). The deductions were disallowed; petitioners' duly filed claims for refund were rejected; and an action for refund was brought (Pet. App. i-ii).

At the trial before a jury, the evidence disclosed that the petitioners acquired the property in 1949 or 1950, that there were then elm trees growing on the property, and that they planted more (R. 39-40). Phloem necrosis appeared in Champaign County, Illinois, in the early 1950's (R. 24-25), and it has spread west along the 40th parallel from the Appalachian Mountains to the State of Kansas (R. 88). Phloem necrosis is a virus which is carried by an insect called a leaf hopper. The insect, after feeding on

the leaves of an infected tree and sucking up its sap, moves on to a healthy tree into which it injects the virus while feeding on its leaves. The virus then flows down the tree to infect the roots, kills them, and then flows back up the tree as the sap rises and infects all parts thereof. It enters and kills the phloem of the tree, the woody connective tissue just beneath the bark (R. 27-28, 50).

There was evidence that the bite of one leaf hopper carrying the virus was sufficient to infect an elm tree and that an infected tree inevitably died from the disease since there was no known way to kill the virus or to cure an infected tree (R. 28, 35, 79, 89). Control of the disease involved controlling the activities of the leaf hopper by spraying, but spraying had proven to be ineffective in practice (R. 31-32, 59-60). There were differences in the evidence as to how soon death occurred after infection. Two witnesses stated that the interval between infection and the first sign of symptoms was about a year (R. 33, 74-75), but there was also testimony from which the jury could have concluded that infection produced death in a month (R. 53).

The jury returned a verdict for the petitioners and the district court denied the government's motion for judgment notwithstanding the verdict and entered judgment on the verdict (R. 17-19.) The court of appeals reversed, holding that the losses attributable to the death of the elm trees of the petitioners were not casualty losses within the meaning of Section 165 (c) of the Internal Revenue Code of 1954 as a matter of law (Pet. App. v-vi).

## ARGUMENT

There is no conflict, and the result reached by the court of appeals is correct.

1. The petitioners point to no court of appeals decision which directly conflicts with the decision of the court below. Rather, they contend that the court of appeals departed from the commonly accepted definition of a casualty when it relied upon foreseeability alone in holding that the deaths of their elm trees did not constitute casualty losses (Pet. 7-8).

The general loss deduction provided by Section 165 of the 1954 Code, *supra*, is limited, in the case of individuals, to uncompensated losses incurred in a trade or business or in a transaction entered into for profit, or arising from "fire, storm, shipwreck, or other casualty, or from theft." The 1954 Code provides no definition of the term "casualty" and there is no legislative history indicating the intent of the Congress which first introduced the phrase "other casualty" into the revenue laws as Section 5(a) Fourth of the Revenue Act of 1916, c. 463, 39 Stat. 756. Accordingly, the courts have relied upon the usual devices of statutory interpretation, such as the rule of *ejusdem generis* and dictionaries, in order to determine whether or not a given loss was in fact produced by a "casualty". Generally, that term has been equated with "accident" and confined to events having the characteristics of being sudden, unexpected, and unusual.[2]

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[2] In another context, this Court has noted that "An accident or casualty, according to common understanding, pro-

Petitioners contend that under the accepted test these characteristics or factors are applicable in the disjunctive (Pet. 7-8). Opinions of some courts of appeals have treated them conjunctively,[3] others disjunctively.[4] None reflects a concern for conjunctivity or disjunctivity. An examination of the decisions indicates that the presence or absence of one or more of these characteristics and the relative weight accorded to them have varied with the nature of the event relied upon as constituting a casualty and the property on which it acted.

Thus, in *Matheson* v. *Commissioner*, 54 F. 2d 537, the Second Circuit found no casualty where the corrosion and rusting of the reinforcing bars of a building's concrete floor beams were due to the ordinary action of the elements rather than to a serious storm, cataclysmic operation of the elements, or serious injury to the foundation. The Ninth Circuit, in *United*

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ceeds from an unknown cause or is an unusual effect of a known cause. Either may be properly said to occur by chance and unexpectedly." *Chicago &c. Railroad Co.* v. *Pullman Car Co.*, 139 U.S. 79, 86.

[3] *United States* v. *Rogers*, 120 F. 2d 244, modified on rehearing, 122 F. 2d 485, 490 (C.A. 9th); *Tank* v. *Commissioner*, 270 F. 2d 477, 482 (C.A. 6th); *Burns* v. *United States*, 174 F. Supp. 203 (N.D. Ohio), affirmed *per curiam*, 284 F. 2d 436 (C.A. 6th). See also *Bercaw* v. *Commissioner*, decided January 21, 1947 (P-H Memo T.C., par. 47,005), affirmed on other issues, 165 F. 2d 521 (C.A. 4th).

[4] *Matheson* v. *Commissioner*, 54 F. 2d 537 (C.A. 2d); *Rosenberg* v. *Commissioner*, 198 F.2d 46 (C.A. 8th), acquiescence withdrawn, Rev. Rul. 63-232, 1963-2 Cum. Bull. 97; *Levy* v. *Commissioner*, 212 F. 2d 552 (C.A. 5th).

*States* v. *Rogers*, 120 F. 2d 244, modified on rehearing, 122 F. 2d 485, 490, found no casualty loss where the damage was due to termites or dry rot since the term "casualty" included a sense of suddenness and termite or dry rot damage was a development occurring over a long period of time. In another termite case, the Second Circuit agreed with the *Rogers* decision, noted that its own decision in *Matheson* v. *Commissioner*, *supra*, was in accord, and denied a claim for a casualty loss deduction. *Fay* v. *Helvering*, 120 F. 2d 253. Thereafter, the Eighth Circuit allowed a casualty loss deduction for termite damage by finding that the circumstances were unusual in that the damage had proceeded in a relatively short period of time. *Rosenberg* v. *Commissioner*, 198 F. 2d 46, acquiescence withdrawn, Rev. Rul. 63-232, 1963-2 Cum. Bull. 97.

In a case very similar to the case at bar, the Sixth Circuit affirmed the judgment of the district court denying a deduction for loss due to the death of an elm tree by reason of Dutch Elm disease. The district court had concluded that the action of the disease was progressive. *Burns* v. *United States*, 174 F. Supp. 203 (N.D. Ohio), affirmed *per curiam*, 284 F. 2d 436 (C. A. 6th). On the other hand, the Sixth Circuit also allowed a casualty loss deduction for damage to a house caused by the slippage of the riverbank on which it stood. In that instance, it held the slippage to be both unusual and unforeseen. *Tank* v. *Commissioner*, 270 F. 2d 477. In *Levy* v. *Commissioner*, 212 F. 2d 552, the Fifth Circuit denied a casualty loss deduction for payments made to repair a sagging

roof; the taxpayers, lessees of the building, had been aware of the defective condition for some time. It appears that this was an alternative holding, as the court also held that the payments constituted capital expenditures and that the taxpayers had a right of reimbursement against their lessor.

Obviously, any test which might be formulated for determining a casualty for the purposes of Section 165(c) must do service for a variety of factual situations. The standard thus far developed by the courts of appeals is necessarily imprecise; its application to a given case is a matter of degree and judgment.

2. The result reached by the court below is correct; death from disease does not constitute a casualty as a matter of law. To be contrasted with those events which possess the hallmarks of a casualty are those which may be deemed usual and expected in the nature of things. Thus, destruction of property through the normal action of the elements is not a casualty loss. In *Matheson* v. *Commissioner*, 54 F. 2d 537 (C. A. 2d), it was held that losses caused by corrosion and rusting were not casualty losses because they were due only to the ordinary action of the elements. By the same token, death resulting from disease is not a casualty loss. Such an occurrence is one of those events which all owners of plants and animals must expect in the normal course of things; in common parlance, it is not regarded as an accident.

The petitioners point to no decision which holds that the loss of plants or animals through death from disease is a casualty loss. The Tax Court and the

Commissioner of Internal Revenue have ruled to the contrary. *McMorran* v. *Commissioner*, decided March 20, 1939 (P-H Memo B. T. A., par. 39,117) (horse); Rev. Rul. 57-599, 1957-2 Cum. Bull. 142 (phloem necrosis) (Appendix, *infra*). Cf. I. T. 3696, 1944 Cum. Bull. 241; Rev. Rul. 54-395, 1954-2 Cum. Bull. 143; Rev. Rul. 61-216, 1961-2 Cum. Bull. 134 (involuntary conversions). The decision relied upon by the petitioners (Pet. 13) held that the loss of sheep through disease was a deductible loss where they had been purchased in a transaction entered into for profit. *Marshall* v. *Commissioner*, decided February 14, 1941 (P-H Memo B. T. A., par. 41,112), affirmed, 128 F. 2d 741 (C. A. 6th), certiorari denied, 317 U. S. 657. See Section 165(c)(2), *supra*.

Indeed, in a case involving the loss of an elm tree through death from Dutch Elm disease, the district court held that loss occasioned by disease, however contracted, was not a casualty within the meaning of the statute. *Burns* v. *United States*, 174 F. Supp. 203 (N.D. Ohio), affirmed *per curiam*, 284 F. 2d 436 (C. A. 6th). The court noted (174 F. Supp., p. 210):

> There is nothing sudden, unusual or unexpected for a bettle (or any other insect) to feed on a tree, or to deposit its eggs underneath the bark in the tree lining or to act as a carrier of disease or for the tree to become infected with disease and die in consequence thereof. *These are everyday occurrences of nature.* [Italics added.]

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH, 1965.

## APPENDIX

Rev. Rul. 57-599, 1957-2 Cum. Bull. 142:

Advice has been requested whether, under section 165(c) of the Internal Revenue Code of 1954 or section 23(e)(3) of the Internal Revenue Code of 1939, an allowable deduction as a casualty loss arises when otherwise apparently healthy elm trees are lost either by the disease "phloem necrosis" or by an attack of insects.

In the instant case five trees leafed out in early spring in apparent good health and so continued until summer when the bark began to split open. Within a few days the trees died. The cause of death was attributed to the disease "phloem necrosis." Four other trees, in healthy condition on July 1, were attacked by insects shortly thereafter and were dead by July 10, of the same year.

Section 165(c) of the 1954 Code and section 23(e)(3) of the 1939 Code provides, in part, for a deduction from income of losses arising from fires, storms, shipwreck, or other casualty.

In the case of *Ray Durden et al.* v. *Commissioner*, 3 T. C. 1, acquiescence C. B. 1944, 8, the court held that the definition of "other casualty" excludes the progressive deterioration of property through a steadily operating cause. Also see, *Hugh M. Matheson et al.* v. *Commissioner*, 54 Fed. (2d) 537, Ct. D. 510, C. B. XI-2, 393 (1932) and *Charles J. Fay* v. *Helvering*, 120 Fed. (2d) 253.

Similarly, the court held in the case of *Betty Rogers et al.* v. *Commissioner*, 120 Fed. (2d) 244, that the word "casualty" denotes an accident, a mishap, or some sudden invasion by a hostile agency, and excludes the progressive deterioration of property

through a steadily operating cause. Since damage by termites is not a sudden occurrence, but is a development over a longer period of time, the loss resulting therefrom is held not to be a casualty. Also, see Rev. Rul. 79, C. B. 1953-1, 41 and *Harry Johnston Grant* v. *Commissioner*, 30 B.T.A. 1028, acquiescence C. B. XIII-2, 8 (1924).

The very nature of the disease phloem necrosis indicates that the loss arises through a progressive deterioration rather than a sudden occurrence. "Necrosis" is defined in Webster's New International Dictionary (Second Edition) in part as follows:

2. * * * A localized or general death of plant tissue caused by low temperatures, fungi, etc. * * *.

The lack of suddenness is also present where the loss of trees is a result of insect infestation. While it may be true that the arrival of the insects is sudden the death of the tree is the result of progressive deterioration.

In view of the above, it is held that a loss arising from the death of trees as a result of disease or attack by insects does not constitute an allowable deduction as a casualty loss within the meaning of section 165(c) of the 1954 Code or section 23(e)(3) of the 1939 Code.

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